Jaferi bin Ipee v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO Q-05–411 OF 2010
APANDI ALI, ANANTHAM KASINATHER JJCA AND DAVID WONG J
3 JANUARY 2013

Evidence — Identification evidence — Quality of identification evidence — Murder — Whether accused mistakenly identified — Whether eye-witness had sufficient time, opportunity and good visibility to accurately identify accused — Whether identification evidence consistent with Turnbull guidelines — Whether accused positively identified at identification parades — Whether defence mere outright denials

The main issue in this appeal was whether the appellant ('accused') was correctly identified as one of two persons who had committed a murder. The accused was convicted and sentenced to death by the High Court for murdering a 31-year-old man ('the deceased') at a farmhouse in Kuching, Sarawak, together with another person still at large. The incident took place about 11.30pm when the deceased and his wife ('Neti') were asleep in the farmhouse. They were woken up by noises at their front door and discovered it was the accused, armed with a knife, and a smaller sized man, who were demanding that the door be opened. When their demands were not met the two broke down the door, entered the house, assaulted the deceased and dragged him outside. The accused then returned to drag Neti outside to where her husband was, about 20 feet away from the main door of the house. The deceased and Neti were tied up but she was then dragged back into the house by the accused who, with a knife to her throat, demanded to know where the money was kept. She refused to tell and the accused shouted to his accomplice outside to 'bunuh saja suami dia' to which the other replied 'sudah, sudah'. Fearing for her life, Neti told the accused where the money was kept. After the intruders had taken the money the smaller sized man dragged the deceased, who was motionless, back into the house and put him on a bed in the room. Neti testified that she saw a stab wound on the left side of his waist. The accused then dragged Neti onto the same bed and tried to rape her but he was not able to carry out the act. He then dragged her back to near the main door where her hands and feet were tied up. The intruders then doused her, the deceased and the curtains of the house with petrol which was stored in the house. Neti begged the accused to spare her life but he replied that he had to kill her as she could recognise him. The accused then set fire to the bed and the deceased and the intruders left the house with Neti in it. She managed to hop away from the burning building and hid in a nearby jungle until daylight when she called for

help. Neti testified that although no lights were switched on inside the house on the night in question, there was a fluorescent light on the ceiling above the main door of the house. Subsequent to the incident, Neti positively identified the accused at two separate police identification parades. In the instant appeal against his conviction and sentence the accused argued that the evidence identifying him as one of the perpetrators of the crime was doubtful as the photo-fit composed by the police based on Neti's recollection did not resemble him. The accused also said the *Turnbull*'s guidelines on identification evidence were not adhered to.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) Neti's testimony was unwavering and firm. This was not a case of mistaken identity. From the facts of the case there was no real doubt about the accuracy of the identity of the accused by Neti (see para 24).

(2) Applying the *Turnbull*'s guidelines to the facts of this case, there was no doubt the accused was correctly identified by Neti. There was more than enough light for purposes of identification from the fluorescent tube above the main door of the house through which the intruders entered and through which Neti was dragged twice by the bigger sized man and near which she was finally tied up and left. The burning bed with the deceased on it would also have created a bonfire which again would have provided more than sufficient light for identification purposes. Finally there was the bigger man telling Neti he had to kill her as she could identify him (see para 9).

(3) The whole episode, of kicking down the front door, the struggles, the dragging of Neti, the questions as to the whereabouts of the money, the attempted rape and the pouring of petrol that was obtained from some other part of the house must have taken some time. The interactions between Neti and the bigger sized man were within close proximity of each other. This was not a case of a 'fleeting glance' within a very short span of time. Neti had all the opportunity and good visibility for her evidence on the identification of the accused to be acceptable (see paras 9(j) & 10).

(4) Neti positively identified the accused twice at two separate identification parades. Even though she was subjected to severe cross-examination on the identification parades, her evidence remained unshaken. The identification parades took place about two weeks after the incident which was within a reasonable period when her memory was still vivid and fresh (see para 12).

(5) The defence consisted of three sentences only ie that the accused did not cause the deceased's death, that he was not at the farmhouse on the night

in question and that he was not involved in any way with this case. The defences were just mere outright denials and nothing more and they did not assist the accused (see para 19).

[Bahasa Malaysia summary

Isu utama dalam rayuan ini adalah sama ada perayu ('tertuduh') secara betul dikenal pasti sebagai salah seorang daripada dua orang yang melakukan pembunuhan. Tertuduh disabitkan dan dihukum mati oleh Mahkamah Tinggi kerana membunuh lelaki berumur 31 tahun ('si mati') di rumah ladang di Kuching, Sarawak, bersama seorang lagi yang masih di cari. Kejadian ini mengambil tempat lebih kurang pukul 11.30 malam semasa si mati dan isterinya ('Neti') tidur di rumah ladang tersebut. Mereka dikejutkan dengan bunyian di pintu hadapan dan mendapati tertuduh yang bersenjatakan pisau, dan seorang lelaki yang lebih kecil, yang meminta pintu tersebut dibuka. Apabila permintaan mereka tidak diikuti kedua-dua mereka memecahkan pintu, memasuki rumah, menyerang dan menyeret si mati keluar rumah. Tertuduh kemudian kembali untuk menyeret Neti keluar rumah ke tempat suaminya berada, lebih kurang 20 kaki daripada pintu utama rumah tersebut. Si mati dan Neti diikat tetapi Neti kemudiannya diseret semula masuk ke dalam rumah oleh tertuduh yang meletakkan pisau di lehernya, meminta untuk mengetahui di mana wang disimpan. Neti enggan memberitahu dan tertuduh menjerit kepada rakan sejenayahnya di luar untuk 'bunuh saja suami dia' yang mana seorang itu menjawab 'sudah, sudah'. Takut akan nyawanya, Neti memberi tahu tertuduh di mana wang disimpan. Selepas penceroboh-penceroboh mengambil wang, lelaki yang lebih kecil itu menyeret si mati, yang tidak bergerak, masuk balik ke dalam rumah dan meletakkan dia di atas katil di bilik tersebut. Neti memberi keterangan bahawa dia nampak luka tikaman di sebelah kiri pinggang si mati. Tertuduh kemudiannya menyeret Neti ke atas katil yang sama dan cuba merogolnya tetapi dia tidak dapat melakukan tindakan tersebut. Dia kemudiannya menyeret Neti balik ke kawasan pintu utama di mana tangan dan kakinya diikat. Penceroboh-penceroboh kemudiannya menyiramnya, si mati dan langsir-langsir rumah tersebut dengan petrol yang disimpan di dalam rumah tersebut. Neti merayu kepada tertuduh untuk selamatkan nyawanya tetapi dia menjawab yang dia terpaksa membunuh Neti kerana dia boleh mengenal pastinya. Teruduh kemudiannya membakar katil dan si mati dan penceroboh-penceroboh meninggalkan rumah tersebut dengan Neti di dalamnya. Neti berjaya melompat daripada rumah terbakar dan bersembunyi di hutan yang berdekatan sehingga cerah apabila dia menjerit meminta pertolongan. Neti memberi keterangan bahawa walaupun tiada lampu dibuka di dalam rumah pada malam yang dipersoalkan, terdapat lampu kalimantang atas siling di atas pintu utama rumah tersebut. Selepas kejadian tersebut, Neti secara positif mengenal pasti tertuduh di dua kawad cam polis yang berasingan. Dalam rayuan ini terhadap sabitan dan hukumannya tertuduh berhujah bahawa keterangan mengenal pasti dia sebagai salah seorang pelaku jenayah

adalah diragui kerana gambar yang dilakarkan oleh polis atas ingatan Neti tidak menyerupai dia. Teruduh juga menyatakan garis panduan *Turnbull* atas bukti pengenalan tidak dipatuhi.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Keterangan Neti adalah kukuh dan tegas. Ini bukan kes identiti silap. Daripada fakta kes tidak terdapat keraguan mengenai ketepatan identiti tertuduh oleh Neti (lihat perenggan 24).

(2) Mengguna pakai garis panduan *Turnbull* kepada fakta kes ini, tidak terdapat keraguan tertuduh dikenal pasti secara betul oleh Neti. Terdapat cahaya yang mencukupi untuk tujuan mengenal pasti daripada lampu kalimantang di atas pintu utama rumah tersebut di mana penceroboh-penceroboh memasuki rumah dan di mana Neti diseret keluar dua kali oleh lelaki yang saiz badannya lebih besar dan di mana di akhirnya diikat dan ditinggalkan. Katil yang terbakar yang mana si mati berada di atasnya ia juga akan membentuk unggun api yang mana juga akan memberikan cahaya yang mencukupi untuk tujuan mengenal pasti. Akhirnya terdapat lelaki yang besar memberitahu yang dia terpaksa membunuh Neti kerana dia dapat mengenal pastinya (lihat perenggan 9).

(3) Seluruh episod, menendang pintu hadapan, pergelutan, penyeretan Neti, persoalan di mana wang tersebut, percubaan merogol dan penyimbahan petrol yang diperolehi daripada bahagian lain rumah tersebut mesti mengambil masa. Interaksi antara Neti dan lelaki yang berbadan besar adalah dalam jarak dekat satu sama lain. Ini bukan kes 'fleeting glance' dalam jangka masa yang singkat. Neti mempunyai semua peluang dan penglihatan yang baik untuk keterangannya atas mengenal pasti tertuduh untuk diterima (lihat perenggan 9(j) & 10).

(4) Neti secara positif mengenal pasti tertuduh dua kali di dua kawad cam yang berasingan. Walaupun disubjekkan kepada pemeriksaan balas yang teruk atas kawad cam, keterangannya kekal. Kawad cam mengambil tempat lebih kurang dua minggu selepas kejadian tersebut yang mana berada dalam masa tempoh munasabah yang mana memorinya masih jelas dan segar (lihat perenggan 12).

(5) Pembelaan mengandungi hanya tiga ayat iaitu bahawa tertuduh tidak menyebabkan kematian si mati, yang dia tidak berada di rumah ladang di malam yang dipersoalkan dan bahawa dia tidak terlibat langsung dengan kes ini. Pembelaan-pembelaan adalah semata-mata hanya penafian terang-terangan dan tidak lebih dari itu dan ia tidak membantu tertuduh (lihat perenggan 19).]

Notes

For cases on quality of identification evidence, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2011–2017.

Cases referred to

Arumugam & 2 Ors v PP [1994] MLJU 203; [1994] 4 CLJ 519, HC (refd)
Chan Sin v PP [1949] 1 MLJ 106 (refd)
Mohamad Yazri bin Minhat v PP [2003] 2 MLJ 241; [2003] 2 CLJ 65, CA (refd)
Mohd Johi bin Said & Anor v PP [2005] 5 MLJ 409; [2005] 1 CLJ 389, CA (refd)
Ng Thian Soong v PP [1990] 2 MLJ 148, SC (refd)
PP v Ku Lip See [1981] 1 MLJ 258 (refd)
PP v Ling Tee Huah [1982] 2 MLJ 324 (refd)
R v Turnbull [1976] 3 All ER 549; [1977] QBD 224, CA (folld)
Vasan Singh v PP [1988] 3 MLJ 412; [1989] 1 CLJ (Rep) 166, SC (refd)
Yau Heng Fang v PP [1985] 2 MLJ 335, SC (distd)

Legislation referred to

Criminal Procedure Code s 402A
Penal Code s 302

Appeal from: Criminal Trial No 45–01 of 2004–I (High Court, Kuching)

Anthony Tai (Anthony Tai & Advocates) for the appellant.
Mahadhir Mohd Khairudin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Apandi Ali JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant was convicted for the offence of murder under s 302 of the Penal Code and sentenced to death. The charge against the appellant reads as follows:

> That you, with another person (still at large), on 21st day of July, 2003, at about 11:30 p.m., at a Farmhouse Lot, 948, Sg. Moyan, Jalan Sg. Moyan, Baru Kawa, Kuching, in the State of Sarawak in furtherance of the common intention of you both, committed murder by causing the death of RUSLAN BIN RUSLI (M), 31 years old, and that you thereby committed an offence punishable under Section 302 of the Penal Code (Act 574) read with section 34 of the same code.

[2] The appellant's appeal is against conviction and sentence. This is the second time, the appellant appeared before the Court of Appeal. Earlier, he

appeared as a respondent, when the public prosecutor appealed against his acquittal, of the end of the case for the prosecution. In that earlier appeal, the Court of Appeal allowed the public prosecutor's appeal and ordered that defence is to be called. After hearing the defence, the learned trial judge convicted the appellant. On appeal, this court dismissed his appeal and affirmed the conviction and sentence imposed by the High Court.

[3] From the grounds of judgment of the learned trial judge, who took pain to explain the reason for his earlier decision to discharge and acquit the appellant of the end of the prosecution's case and the subsequent reason in convicting the appellant, it is clear that the central issue in this appeal is the identification of the appellant. The learned trial judge wrote: 'The Court of Appeal allowed the appeal and directed that the accused be called to make his defence to the charge. So it must be taken that the prosecution had sufficiently proved the identity of the accused as one of the assailants who had caused the death of the deceased'. In fact, during the hearing of this appeal the core issue submitted by the appellant was on the issue of identification.

[4] Before, we deal with the central issue of identification, it will be appropriate to summarise briefly the facts of the case.

FACTUAL MATRIX OF THE CASE

[5] The facts of the case as unfolded by the prosecution are as follows:

> Ruslan bin Rusli ('the deceased') and his wife Neti Kusrini Binti Mustapha (PW6) are from Indonesia. On 21.7.2003 they also lived on the farm in a farmhouse belonging to their employer. No one else lived in the farmhouse with them.
>
> On the night of 21.7.2003 PW6 and her husband had gone to bed when they were woken up at about 10.00 p.m. by noises coming from their front door.
>
> On peeping her husband saw two persons. Her husband then handed Neti (PW6) a parang while he armed himself with an iron rod.
>
> The two persons outside the house shouted for the door to be opened but when Neti (PW6) and the deceased refused to do so, the persons outside started kicking at the door until it was forced open. The persons then entered the house. According to Neti (PW6) one of them was big sized, about 5' 8" tall and held a knife while the other was a little skinny and about 5' 1" tall.
>
> Neti (PW6) testified that on the night in question no lights were switched on in the house *but outside the house there was a florescent tube fixed to the ceiling above the door to the entrance of the house.* When the two men entered the house, the deceased tried to hit the bigger sized man's hand which was holding the knife but he was pushed by the thinner sized man and fell down.

A Both intruders then began hitting the deceased. Neti (PW6) attacked the bigger sized man and hit him twice on his back with the parang but to no effect as she said he was wearing thick clothing. The parang then fell out of Neti's hand after which the deceased was dragged out of the house by the two men, leaving her alone in the house.

B Later the *bigger sized man* came back and *dragged Neti (PW6) out* of the house as well. She and the deceased were dragged to a *Jackfruit tree* which was about *20 feet away from the main door of the house*.

The deceased's hands and feet were then bound while Neti's hands were tied. The *bigger sized man then dragged Neti (PW6) back* into the house where he placed a knife C at her throat and repeatedly demanded to know where the money was kept but Neti (PW6) refused to tell.

She also heard the deceased shouting out to her not to give any money. The bigger sized man then shouted to the smaller sized man outside the house to 'bunuh saja suami dia'. The smaller sized man then replied from outside the house 'sudah sudah'. D

The smaller sized man then came into the house and began ransacking it while Neti (PW6) was held by the bigger sized man. Neti (PW6) said that fearing for her life, she told them where the money was. After finding the money the smaller sized man left the house but came back, dragging the deceased into the house.

E In the *meantime the bigger sized man had dragged Neti (PW6) to a bed in the room*. The deceased was then placed on the bed next to Neti. She said her husband was motionless but when being put onto the bed His hands had lifted up, allowing her to see a stab wound on the left side of his waist. The smaller sized man then left the house.

F The bigger sized man then tried to rape Neti (PW6) but he was unsuccessful as he could not get an erection. On hearing the smaller sized man shout at him not to take so long, *the bigger sized man dragged Neti (PW6) towards the main door* where her hands and feet were bound by both men.

According to Neti, *she was then about 3 feet away from the main door*. The two men G then began to douse the curtains with petrol which was stored in the house — the petrol was used for operating the sprinkler system on the farm.

The bigger sized man then poured petrol over Neti (PW6) while the smaller sized man poured petrol over the deceased's body which was on the bed. Neti (PW6) then begged the bigger sized man to spare her life. H

She kissed his feet and told him that she had children in Indonesia to support, *but the bigger sized man said he had to kill her as she would recognize his face*.

The two men then left the house. On their way out the bigger sized man lit a lighter and put it close to where the deceased was lying on the bed. *The bed and the deceased* I *caught fire*. The bigger sized man then left the house closing the door behind him with Neti (PW6) left in the house with her hands and feet bound.

Neti (PW6) managed to escape from the burning house by hopping away from it, even though her hands and feet were bound. She then hid in a nearby jungle until daylight when she raised the alarm and managed to contact her employer to inform

him of what happened. On 22.7.2003 Neti's employer went to the farmhouse together with his driver one Kheng Lee Anak Binya who later lodged a police report at Batu Kawa Police station on the matter. That police report is Batu Kawa Report No. 863/03 (exhibit P7).

THE CENTRAL ISSUE ON IDENTIFICATION

[6] On this central issue, learned counsel for the appellant argued that there is doubt as to the identity of the appellant as the computerised facial composition, as in exh P8 has no resemblance of the appellant. It was also argued that the identification of the appellant did not follow the 'Turnbull Guidelines' on identification.

[7] On the evidence adduced at the trial, with respect, we could not agree with the above-said contentions by the learned counsel for the appellant.

[8] The so-called 'Turnbull Guidelines' are as set out by the English Court of Appeal in *R v Turnbull* [1976] 3 All ER 549 or; [1977] QBD 224, which reads as follows:

> First, whenever the case against an accused depends wholly or substantially on the *correctness* of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.
>
> Secondly, the judge should direct the jury to examine closely *the circumstances* in which the identification by each witness came to be made. How long did the witness have the accused under observation. At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or an indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.

[9] The guidelines basically state the factual circumstances that would justify

an 'acceptable' identification. It speaks of visibility and opportunity. In this appeal, in order to vizualise the circumstances as to whether the witness, PW6, Neti did have a good *opportunity* and *visibility* for her evidence on identification of the appellant to be credible, it is pertinent to refer to the following salient facts:

(a) at the particular house where the robbery and murder took place, there was a florescent tube lighting fixed to the ceiling above the door to the entrance of the house. That being the case, surely when the door to house was kicked by the intruders, the light from the said florescent lighting would have shone into the house;

(b) PW6, Neti was dragged through the door to the entrance of the house, at least, twice by the person whom she had described as the bigger sized man. First she was dragged out of the house and placed under a jackfruit tree. Later PW6 was again dragged into the house, to a bed in a room, the house;

(c) the place where PW6 was placed, under a jackfruit tree, in front of the house, was only 20 feet away from the main door of the house. Surely again, at a distance of 20 feet, the lights from the florescent tube lighting must have shone right up to the tree and beyond;

(d) after failing in his attempt to rape PW6, the bigger sized man, once again dragged her to the main door, where both intruders tied her legs and hands. According to PW6, she was then about 3 feet away from the main door. Here again, it is very near to the florescent tube lighting, that was hanging above, at the ceiling. There was more than enough light for purposes of identification;

(e) what really transpired at the main door are as narrated by PW6, as follows:

> The bigger man then dragged me towards the main door and tried to tie my hands again. The thinner person then came and tied up my legs. I pleaded with the bigger man not to kill me as I have children in the kampong.
>
> The bigger man then poured petrol over me while the thinner man poured petrol over my husband's body that was still lying on the bed. Each of them had a can of petrol. They got the petrol from our house. It was used to operate the engine for the sprinkler system.
>
> I then prayed at the feet of the bigger man and kissed his feet begging him not to kill me but he said he had to kill me as I would recognize his face. He said he had to kill me otherwise tomorrow I would lodge a police report.
>
> While I was begging the bigger man for my life, this took place not far from the main door of the house. It was about 3 feet from the main door. The bigger man then punched me and kicked me while I was still tied.

Then they left and while on the way out the bigger man lit a lighter and put it close to where my husband was lying on the bed. The bed and my husband caught fire. The bigger man then left the house and closed the main door behind him, leaving me inside the house.

(f) the evidence of the bigger sized man telling PW6 that he has to kill her because she would recognise him and would lodge a police report against him, is by itself evidence that the *bigger sized man was aware* that he *could be* recognised and *identified*;

(g) the evidence of the bed and the deceased being burned with a lighter, after pouring petrol on the bed and the deceased, would have created a *bonfire*, which in the circumstances, have lighted up the whole place. This circumstance would have given rise to another opportunity to identify the bigger sized man as there would have been more that sufficient light;

(h) the bigger sized was subsequently identified by PW6, to be the appellant;

(i) there was no evidence or suggestion that the intruder were wearing any mask or covering their faces; and

(j) the whole episode, of kicking the door, the struggles, the dragging of PW6, the questions as to the whereabout of money in the house, the attempted rape, the pouring of petrol (that was obtained from some other part of the house) must have take some time. The interactions between PW6 and the bigger sized man are within close proximity to each other.

[10] From the above listed salient facts, this is not a case of a 'fleeting glance' within a very short span of time. PW6 had all the opportunity and with good visibility for her evidence on the identification of the appellant to be acceptable. The circumstances in this case is a far cry from the poor visibility and opportunity as in the case of *Yau Heng Fang v Public Prosecutor* [1985] 2 MLJ 335.

[11] In this appeal, it is also our judgment that the identification parade that was conducted by PW8, Insp Fauzan was in accordance with the standard and acceptable practice. From the identification parade report (exh P10), it can be seen that there is no great disparity of the ages of the participants and that of the appellant. This is in line with the observation made by Willan CJ in *Chan Sin v Public Prosecutor* [1949] 1 MLJ 106.

[12] We note that in this appeal, PW6 positively identified the appellant twice, at two separate identification parades. We also note that eventhough PW6 was subjected to severe cross-examination (from pp 48–50 of the appeal records) on the identification parade, her evidence remained unshaken. It is also note worthy to state that the identification parades took place on 5 August

2003, about two weeks after PW6's ordeal at her house. It was held within a reasonable period when the memory of the identifier is still vivid and fresh.

[13] On the issue of the computerised facial composition (exh P8), the salient facts are as follows:

(a) PW7, L/Cpl Kansan, who drew up P8, in his evidence said:

> The scope of my duty as a computerized facial composer is that when a witness or complainant comes to see me and gives me a description of a person regarding his eyes, nose, mouth, chin and hair I will try to find a match in the computer with the description given of the features I just described.
>
> The samples of the features I just described are already in the computer programme supplied by Police Headquarter in Bukit Aman, Kuala Lumpur.
>
> When the face of a person is composed on the computer using the description supplied and appears on the screen, the witness is asked by how many percent the picture on the computer is similar to the person being drawn.
>
> When the lady gave me the description and I had done the facial composition on the computer, the lady saw it and said it was 60% likeness to the person being described.
>
> The five descriptions the lady gave me were of the eyes, nose, mouth, chin and hair which became a face and she said it was 60% likeness.
>
> The way I composed the face on the computer was like this: I asked the lady to describe the eyes. In the computer there are many images of the eyes, I will then scroll through and ask the lady to indicate. When she said it was like the eyes of the person she was describing, I will select that particular image, then go on to the next facial feature which is the nose. I will go through the same process I described for each feature until the 5 features I described are completed when we will have a composite face on the computer. That is the face the lady will be asked to indicate how many percent it is like the person being described.

(b) PW12, the arresting officer who arrested the appellant, testified as to *how* he uses P8 in assisting him to identify the appellant, as follows:

> *This photo-fit exhibit P8 assisted us in identifying the suspect* when the police launched the operation to arrest the suspect.
>
> When we arrived at the house we used the pho-fit to help us to identify the suspect from amongst the people in the house.
>
> There were a number of people in the house. I cannot recall how many persons were there or how many men there were in the house.
>
> As a police officer who is experienced in CID work, I do not take the image shown in a photo-fit as 100% accurate of the person we are looking for. *I regard a photo-fit as 60% accurate. I always look for some characteristics in the photo-fit which will help to identify the suspect.*

> For example, in this case *it was the eyes shown in the photo-fit which was the distinguishing feature*. I also used the general outline of the face shown in the photo-fit.

[14] In cross-examination, PW12 maintained that exh P8 had a 60% resemblance of the appellant.

[15] On this issue, the learned trial judge wrote:

> When Neti said that the completed image on the computer was 60% like the suspect, it must not be overlooked that what Neti was referring to was a 'composite' image or picture ie a picture assembled or pieced together from different images of a persons eyes, nose and mouth shown to Neti. Since Neti was asked to compose a picture from pre-prepared image, it would be humanly impossible to compose a 100% likeness of the Accused. Likewise just because Neti may not be able to remember or describe in detail the facial features of her assailant so that a better than 60% likeness of him can be composed on the computer, it does not follow that if she saw her assailant in person again she would not be able to recognise him and identify him.

[16] We could not find any reason not to agree with the above analysis of the evidence in respect of exh P8.

[17] Corollary to the issue on identification learned counsel for the appellant also submitted that the learned trial judge had failed to adequately consider the defence.

[18] From the appeal records, the defence consisted of three sentences only, which reads as follows:

> I did not cause of Ruslan bin Rusli on the 21st July 2003 at 11.30pm at the farm house Lot 948, Sungai Moyan Batu Kawa.Kuching.
>
> I was not there at the farm house at 11:30pm on 21st July 2003.
>
> I was not involved in anyway in this case.

[19] The defences are just mere denials. The trial court was of such a view and so do we. It is trite law that when the defence case is merely an outright denial and nothing more, it is of no assistance to the accused person. See *Public Prosecutor v Ku Lip See* [1981] 1 MLJ 258. No doubt, an accused person need not have prove anything, but 'A mere denial without other proof to reasonably dislodge the prosecution's evidence is not sufficient', a quotation from *Public Prosecutor v Ling Tee Huah* [1982] 2 MLJ 324.

[20] On the evaluation of the defence, the learned deputy public prosecutor

submitted at length that the denial as to the appellant's presence at the scene of the crime is a defence of alibi which could not be accepted. On this submission, we must state, in obiter, that there is a distinction between bare denial evidence and evidence in support of an alibi. To recapitulate, what the appellant said in evidence was: '*I was not there at the farm house at 11:30pm on 21st July 2003*'. He did not say where he was at that particular time and date. This, in our judgment, is just a bare denial evidence. See *Vasan Singh v Public Prosecutor* [1988] 3 MLJ 412; [1989] 1 CLJ (Rep) 166 and *Ng Thian Soong v Public Prosecutor* [1990] 2 MLJ 148.

[21] In the absence of any evidence in support of an alibi, with due respect, to the learned deputy public prosecutor the issue of any notice of alibi under s 402A of the Criminal Procedure Code, is irrelevant.

CONCLUSION

[22] Upon perusal of the appeal records and after hearing and reading the submissions by both parties, it is our judgment, that applying the *Turnbull*'s guidelines to the facts of this case, there was no doubt that the appellant was correctly identified by PW6. Furthermore, the witness, PW6 subsequently identified the appellant at two identification parades, which were held about two weeks after, the incident (as compared to ten months in the case of *Arumugam & 2 Ors v Public Prosecutor* [1994] MLJU 203; [1994] 4 CLJ 519).

[23] On the usage of the *Turnbull*'s guidelines, we are appreciative of the fact that there are merely guidelines and any findings pertaining to identification will depend on the facts of the case. See *Mohamad Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241; [2003] 2 CLJ 65.

[24] The acceptance of PW6's evidence as to the identification of the appellant, is a finding of fact based on the credibility of the witness. From the evidence adduced at the trial, we find that the testimony given by PW6 was unwavering and firm. This is not a case of a mistaken identity. From the facts of the case we find that there is no real doubt about the accuracy of the identity of the appellant, by SP6.

[25] Last but not least, in hearing this appeal, we are guided by what said in the case of *Mohd Johi bin Said & Anor v Public Prosecutor* [2005] 5 MLJ 409; [2005] 1 CLJ 389, which, inter alia, reads as follows:

> *… Unlike civil appeals, where the appellant carries the burden of showing that the judge at first instance went wrong, in a criminal case the duty of the court is to consider whether the conviction is right. The correct approach is therefore not whether the decision is wrong but whether the conviction is safe …* (Emphasis added.)

[26] In this appeal, it is our judgment that the conviction is safe.

[27] On that note, we unanimously dismissed the appeal by the appellant; and affirmed the conviction and sentence by the High Court.

Appeal dismissed and conviction and sentence affirmed.

Reported by Ashok Kumar